SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,
Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,
Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,
Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Citations to Opinions Below

The opinions of the Court of Appeals of the State of New York are reported at 20 N. Y. 2d 109, 281 N. Y. S. 2d, 799, 228 N. E. 2d 791 (A. 63). The opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, are reported at 27 A. D. 2d 69, 276

N. Y. S. 2d 234 (A. 45). The opinion of the Supreme Court of the State of New York, Albany County, is reported at 51 Misc. 2d 297, 273 N. Y. S. 2d 239 (A. 29).

Jurisdiction

Notice of Appeal was filed on August 17, 1967 (R. 1) and the case was docketed on September 28, 1967. Probable jurisdiction was noted on January 15, 1968. The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are the religion clauses of the First Amendment.

The statute is Section 701, subdivision 3 of the New York Education Law, as amended L. 1965, C. 320, §2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3, which provides:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be

loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Questions Presented for Review

1. Whether Section 701.3 of the New York Education Law violates the establishment clause of the First Amendment insofar as it requires textbooks to be purchased with public funds and furnished for use in sectarian schools.

2. Whether the same section violates the free exercise clause of the First Amendment insofar as it requires textbooks to be purchased with public funds and furnished for use in sectarian schools.

Statement of the Case

Appellants' complaint sought a declaratory judgment that Section 701.2* of the New York Education Law, to the extent it requires the purchase of textbooks with public moneys for free loan to pupils in sectarian schools, is unconstitutional and in violation of the New York State Constitution and the First Amendment to the United States Constitution (A. 6). The Supreme Court, Albany County, granted appellants' cross-motion for judgment (R. 42), denied motions for judgment made by the appellee and the intervenor-appellees (R. 40, 59), and declared the law to the extent challenged unconstitutional and in violation of the state constitution and both the establishment and free exercise clauses of the First Amendment (A. 40). The

* Subdivision (2) was renumbered subdivision (3) by New York Laws of 1966, c. 795.

Appellate Division, Third Department, declined to reach the merits of the case and reversed the order and judgment of the Albany County Supreme Court, and dismissed the complaint (A. 44) on the sole ground that appellants lacked standing to sue (A. 45). Two of the justices who concurred thought the appellants had standing and would have reversed on the merits (A. 47). By a vote of 4-3, the Court of Appeals affirmed the order of reversal of the Appellate Division (A. 62), holding that appellants did have standing to sue and also holding that the law did not violate either the New York State Constitution or the establishment clause of the First Amendment (A. 63).

The facts are not in dispute. Prior to 1965, Section 701 of the New York Education Law authorized school boards to purchase textbooks and either sell or rent them to pupils in public schools (A. 3). In 1965, by Chapter 320 of the Laws of 1965, Section 701 was amended to provide, effective September 1, 1966, that each school board must purchase and loan free to any child, who resides in the district and who is enrolled in grades seven through twelve of a public or *private* school which complies with the compulsory education law, *any* textbook requested by such child which is designated for use in *any* public school by *any* school board in the state (A. 4, 8). As originally enacted, new Section 701 did not contain any limit either as to the number of textbooks required to be purchased and loaned or the amount of public money required to be expended therefor by the local school districts. However, it did direct the Commissioner of Education, in addition to the annual apportionment of public moneys pursuant to the Education Law, to apportion to each school district an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil (A. 5).

After the institution of this action, by Chapter 795 of the Laws of 1966, the Legislature amended Section 701 again to effect two principal changes. One was to reduce the financial burden imposed on local school districts by the law (Subd. 4). The other was to define the word "textbook" as used in the statute to mean: "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends" (Subd. 2). A copy of Section 701 as so amended is set forth as an appendix to this brief.

Before taking office, each member of the appellant school boards took an oath of office, prescribed by Article XIII, Section 1 of the New York State Constitution, to support the Constitutions of the United States and the State of New York. Sections 306 and 1706 of the Education Law provide that any school board member who fails to comply with any section of the Education Law is subject to removal from office by the Commissioner of Education. Section 306 of the Education Law also provides that the Commissioner of Education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law (A. 5).

There are children residing in the appellants' school districts who are enrolled in grades seven through twelve of sectarian schools which comply with the compulsory education law (A. 12).

In the view of the appellant school boards, Section 701, as amended ("Textbook Law") was repugnant to both the New York State and United States Constitutions insofar as it applied to sectarian schools (A. 5). Faced with the choice of either violating their oaths of office or re-

fusing to implement the law thereby incurring the sanctions imposed for non-compliance, on April 29, 1966, the appellant East Greenbush school board commenced this action.

The answer, in substance, admitted the facts pleaded in the complaint as amended, but denied the unconstitutionality of the law (A. 10).

After issue was joined, five parents of children who resided in the school district of the appellant East Greenbush school board and who were enrolled in various grades from seven through twelve of accredited parochial schools were permitted to intervene in the action (A. 20). In their answer, the intervenors denied the allegations of the complaint relating to the unconstitutionality of the law and alleged three affirmative defenses (A. 22). The substance of these defenses was that to forbid the loan of textbooks to their children and other parochial school pupils while permitting the loan of such books to pupils attending private non-sectarian schools would be an interference with their free exercise of religion and a denial of equal protection and due process in violation of the First, Fifth and Fourteenth Amendments and the New York State Constitution (A. 24).

All parties then moved for judgment (R. 40, 42, 59). At the time of argument on the motions, the appellant Board of Education of Union Free School District No. 3 was joined as a party plaintiff (A. 27).

Summary of Argument

POINT I

Everson established that a state cannot contribute tax funds to the support of a religious institution. A sectarian school is a religious institution since its basic purpose is religion and the teaching of religion. There is no such thing as secular education in a sectarian school because the whole curriculum is permeated by religion. Textbooks, unlike transportation, are an integral part of the educational process which takes place in a sectarian school. They are used in connection with the teaching of religious tenets and faiths. By furnishing textbooks to sectarian schools, the state enables such schools to purchase religious texts with the money thus saved.

The student is only a nominal party in the selection and distribution of books under the Textbook Law. The parochial school instructs its students what books to obtain, it takes delivery of the books and it may store them indefinitely. The mere fact that textbooks also happen to benefit the students has no constitutional significance since all aid to parochial schools benefits their students. The so called "child benefit theory", which was rejected by implication in *Everson,* is merely a device to accomplish indirectly what cannot be done directly.

The Textbook Law did not establish a constitutionally valid public library system. The purpose of a public library is to purchase a wide variety of books, most of which are not "textbooks", and to make them available for a limited time to anyone in the library community. Public libraries make the book purchasing decisions and lend directly to

individual students without the intervention of the parochial school officials. They do not buy books at the order of religious authorities or permit exclusive utilization of books by persons of a particular religious background or institution.

The rule which emerges from the establishment clause tax cases is that if the particular public aid is earmarked for use by or within the confines of a religious institution in connection with functions associated with religion, then it is barred by the establishment clause.

The *Everson* interpretation of the scope of the establishment clause has not been narrowed by any subsequent decision. Where, as here, the issue is whether a particular law constitutes an impermissible aid to religion, once it is shown that it does, there are no saving considerations.

Recent state court decisions show a trend away from a few early decisions which sanctioned the practice of furnishing textbooks for use in parochial schools.

POINT II

The religious clauses of the First Amendment were designed to remove religion from the cognizance of the state. It was thought that religious liberty could flourish only if religion remained a matter of conscience, free from state support and other interferences. A state's use of its taxing powers to pay religious costs, educational or other, is no less an interference with religious freedom than forcing a man to attend church.

To the extent the Textbook Law requires books to be purchased with tax funds and furnished for use in a sec-

tarian school operated by members of one faith, it compels members of other faiths and nonbelievers to contribute to the propagation of opinions they disbelieve. It also creates the conditions under which the state may interfere with the freedom of sectarian schools, since control often follows aid as a matter of course. And, in its operation and through the built-in pressures to obtain control of the selection of the books, it brings about a union of church and state.

POINT I

To the extent the Textbook Law requires textbooks to be furnished for use in parochial schools, New York is using its taxing powers to support religious institutions in violation of the establishment clause of the First Amendment.

The issue in this case is whether a state may use its taxing powers to furnish textbooks for use in parochial schools. If a textbook is an integral part of the educational process, and if the operation of a sectarian school is intended by its sponsor to fulfill a basic religious function, then the furnishing of such book by the state constitutes a use of public funds for the support of a religious institution. The seminal case on the impact of the establishment clause on a state's power to tax is *Everson* v. *Board of Education,* 330 U. S. 1 (1947). It is, therefore, necessary to begin our present inquiry with an analysis of that case. In this connection, it is submitted that *Everson,* like any other landmark decision in a highly sensitive area, is important not only for what it said, but for what it did not say.

A. *Everson* established that a state cannot contribute tax funds to the support of religious institutions.

At issue in *Everson* were the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Justice Black, speaking for the majority, defined the scope of the establishment clause as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States, supra* at 164." (330 U. S. at 15.)

While four justices split over the application of this definition to the facts of the case, it is important to observe that all of them agreed to the definition. What is more,

this definition has been repeated and reaffirmed three times since *Everson,* once by a unanimous court in *Torcaso* v. *Watkins,* 367 U. S. 488, 492-3 (1961).*

When he came to the application of the definition to the busing law, Justice Black first turned to the nature of the aid. Providing transportation, he said, was like state action in providing police and fire protection for schools. He then observed that the aid must not be outlawed if it was within the state's constitutional power even if it approached the verge of that power. A state, he said, could not contribute tax funds to the support of an institution which teaches the tenets and faith of any church. Presumably he was referring here to parochial schools. But neither could a state interfere with the free exercise by its citizens of their own religion, such as by excluding any believers or non-believers because of their faith or lack of it from receiving the benefits of public welfare legislation. With the issue thus posed, Justice Black reached this conclusion:

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." (330 U. S. at 18.)

In his dissent, Justice Rutledge disagreed with the majority's conclusion that the busing law did not support the church schools. He contended that the primary reason

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* See also, *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Illinois, et al.,* 333 U. S. 203, 210, 211 (1948), and *McGowan* v. *Maryland,* 366 U. S. 420, 443 (1961).

children were sent to parochial school was to receive religious training and teaching. Payment of transportation costs not only helped the children to get to school and the parents to send them, but it aided them in their objective and was therefore aid to religion. Any aid to religion, he said, was intended by the framers of the First Amendment to be outlawed as constituting an establishment. To Justice Rutledge, the dual prohibition of the First Amendment made the religious function private and it could not be made a public one by legislative act. Thus, whether or not taxes were raised for a public purpose was, for him, a false issue clouding the real issue of the First Amendment's absolute bar.

It thus appears that what *Everson* did say was that the New Jersey busing law approached the verge of that state's constitutional power, that the providing of transportation resembled state action in providing functions (such as police and fire protection) which are in no sense connected with the religious functions of a parochial school, and that New Jersey contributed no money to the parochial schools and did not support them. It was this last finding that marked the point of divergence between the views of the majority and Justice Rutledge. It could also be said with some degree of assurance that the majority, like the dissenters, regarded parochial schools as religious institutions, for in posing the establishment clause issue the majority pointed out that a state cannot contribute tax funds "to the support of an institution which teaches the tenets and faith of any church."

Advocates of state aid to parochial schools have contended, however, that *Everson* also stands for the proposition that a state may use tax funds to pay for all items

of cost in connection with the obtaining of a parochial school education. They urge that *Everson* is to be read as saying that any tax measure is valid if the funds are appropriated for a public purpose, that the education of children is a public purpose, and therefore a tax to pay for parochial education is valid. The answer to this is, of course, that *Everson* dealt only with the cost of transportation, and did not deal with any educational costs. It is one thing to say the state may pay the cost of safely transporting a child to a school, including a parochial school. It is quite another thing to say that the state may pay the costs directly connected with the essential functioning of the parochial school itself. Furthermore, if the court really did subscribe to the view that any law which served a public purpose was permissible, it seems highly unlikely that it would have devoted such considerable attention to the history of the establishment clause. All it would have had to have done was to affirm on the authority of *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370 (1930). In *Cochran,* a number of citizens and taxpayers of Louisiana sued to restrain state officers from spending public funds for the purchase of textbooks for students attending religious schools on the ground that the laws authorizing such expenditures were repugnant to the state constitution and Article IV, Section 4 and the due process clause of the Fourteenth Amendment to the United States Constitution. No argument was made that the laws in question violated the First Amendment. Indeed, the Supreme Court had not yet determined, as it would ten years later in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), that the establishment clause of the First Amendment was applicable to the states. Accordingly, the case was decided on due process grounds alone. The holding was that for due process purposes a law appropriating money for textbooks for parochial stu-

dents did not constitute a taking of private property for a private purpose.

Had the *Everson* majority been ready to accept the due process test for the busing law, it surely would have accorded *Cochran* a significant, if not a decisive, place in its deliberations. Instead, the majority cited *Cochran* only once, and that was to counter the argument that the busing law served no public purpose at all. Indeed, the court's limited treatment of *Cochran* strongly suggests that the Court felt bound by the doctrine that the test of legislation which collides with First Amendment freedoms is much more definite than the test when only the due process clause of the Fourteenth Amendment is involved, and that First Amendment freedoms "are susceptible of restraints only to prevent grave and immediate danger to interests which the state may lawfully protect." *Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). Justice Brennan echoed this doctrine in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), when he said:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas* v. *Collins*, 323 U. S. 516, 530."

Without citing a single authority, the majority in the court below nevertheless ruled that any program aimed at improving the quality of education in all schools is a matter of legitimate state interest, and that any aid "accruing to these schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (A. 66). It has been shown, however,

that the due process test is not applicable to legislation which collides with First Amendment freedoms. Indeed, the view of the majority of the New York Court of Appeals cannot be correct. It would mean that a state could constitutionally underwrite the entire cost of parochial education, since all aid to parochial schools benefits their pupils.

B. Sectarian schools are religious institutions and textbooks are used by them in teaching their faiths and tenets.

We have seen that the majority in *Everson* viewed a sectarian school as a religious institution. This view was shared by the two dissenting opinions. Thus, after referring to the Canon Law of the Church relating to Catholic Schools by which all Catholics were bound,* Justice Jackson commented:

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*"'1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place .... (Canon 1372.)'

'1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine. The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)'

'1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)'

'1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church. The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.

'They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)' (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of NewYork and others, 1940.)" 330 U. S. at 22.

"I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . .

Catholic education is the rock on which the whole structure rests, and to render tax aid to its church school is undistinguishable to me from rendering the same aid to the Church itself." (330 U. S. at 24.)

And in the same vein, Justice Rutledge said:

"It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine . . .

Indeed, the view is sincerely avowed by many of various faiths, that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being." (330 U. S. at 46.)

There is no such thing as secular education in a sectarian elementary or secondary school. The whole curriculum is permeated by religion. If this were not the case, there would be no point in maintaining parochial schools. It would be far simpler to send children to public school for the secular courses and then after school to church for religious education.

Whereas, in *Everson,* the benefit was a non-educational benefit, separate and marked off from the educational function of the sectarian school, here the benefit is directly connected with the educational process taking place in the school. Transportation may take children to the door of a school, but textbook aid spills over into the classroom. Textbooks are an essential element of education. Indeed, a school cannot function without them. They are one of the three essential components of a school, the others being teachers and pupils.

As Justice Van Voorhis stated in his dissenting opinion in the court below, there is no reliable standard by which secular and religious textbooks can be distinguished from each other (A. 73). But even if it can be shown that particular textbooks do not embody religious symbols, concepts and doctrines, the fact remains that they are used in a place where the syllabus, the teacher and indeed the whole atmosphere is oriented toward religious goals. They are materials which, unlike reference books or books in general, are intended to be used by students under the guidance of the teacher, and not by the students alone. Their contents cannot be fully utilized until they have been subjected to the analysis and interpretation of the teacher. Furthermore, even if the particular textbooks do not promote religion, as such, they obviously enable the parochial schools to purchase religious books with the funds saved as a result of the supplying by the school boards of the non-religious texts.

Since textbooks are an integral part of the educational processes which take place in sectarian schools, and sectarian schools are religious institutions, then to the extent the state furnishes textbooks to be used in such schools it

promotes the teaching of religious concepts. If this is not support of religious institutions, then it is difficult to imagine what is. It is because it felt transportation does not support sectarian schools in teaching their tenets and faiths that the majority in *Everson* was unwilling to outlaw the aid. The same cannot be said of textbooks. The difference is one of kind, not one of degree.

C. The Textbook Law aids parochial schools and the mere fact that it also happens to aid their pupils does not render it permissible.

While they would readily concede that textbooks do aid parochial schools in teaching their faiths and perhaps even that a law which required textbooks to be furnished directly to parochial schools would be invalid, the appellees have contended that since the books are furnished to the pupils at their request and not to the schools, there's a constitutional difference. But wherein lies the difference? Pupils do not use textbooks apart from their studies in school. They need them solely for their work there. In the past, no one suggested or even thought that books which were furnished directly to public schools were furnished to the pupils as distinct from the schools. There is no reason to think so now, whether the school is public or private.

In reality, the only role a twelve-year old child can play in the selection of books to be used in his school courses is to act as a conduit for books which his teacher or school instructs him to obtain. The request may be made in the child's name, but it is the school's request, not the child's. If this were not the case, then the statute would have to be construed to permit a child to compel the local school board to purchase any approved book he wanted, for any purpose, a result which could hardly have been intended by

the framers of the law. In any event, the Legislature foreclosed this possibility by amending the law to define a textbook as one "which a pupil *is required* to use as a text for a semester or more in a particular class in the school he legally attends" (emphasis added). This made unmistakably clear that the child's request is a fiction. Viewed in this light, the Textbook Law is nothing but a transparent attempt to do indirectly what cannot be done directly.

If there were any doubt on this score, it would be dispelled by the interpretation placed on the statute by those who administer it. Shortly after the oral arguments on the motions for judgment in this case, counsel for the University of the State of New York, Education Department, issued and distributed to City, Village and District Superintendents of Schools and Supervisory Principals, Opinion of Counsel No. 181 relating to the interpretation and implementation of the Textbook Law. A copy of this Opinion is set forth as an appendix to this brief. Among other things, the Opinion advised (Par. 12) that while the statute called for pupil requests, the sectarian schools might keep such requests on file and forward merely a summary to the school board (Appendix to Brief, 9a). It also advised (Par. 15) that in considering any requests, it is incumbent upon the school board to examine the existing book stocks of the sectarian schools so as to avoid the duplication of textbooks owned by any of such schools (Appendix to Brief, 11a-12a), and (Par. 16 b) that textbooks used in parochial schools may be stored there under an agreement with the school board (Appendix to Brief, 13a). What the statute implies on its face is thereby confirmed by its implementation. Through its involvement in the administration of the statute, it is the parochial school which is the dominant consideration in the selection and distribution of the books, not the students.

The appellees here have urged and the majority in the court below agreed (A. 66), nevertheless, that the law should be upheld because it aids the pupils and not the parochial schools. This is an attempt to give vitality to the so-called "child benefit theory" which was advanced in *Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929). In that case, four of the seven justices of the Louisiana Supreme Court were of the opinion that laws which appropriated public moneys to be used for purchasing textbooks for all students in the state should be construed as aid to the child and not aid to the parochial school so as to avoid the state constitutional ban on aid to sectarian institutions. While it is true that Justice Hughes quoted this portion of the *Borden* majority opinion in *Cochran* v. *Louisiana State Board of Education, supra,* which was a companion case to *Borden,* it is equally true that by implication at least all nine justices in *Everson* rejected this theory. Indeed, this theory received absolutely no mention in *Everson.*

D. The Textbook Law did not establish a constitutionally valid public library system.

In an attempt to refute the obvious fact that the parochial school is the primary and intended beneficiary of the statute, the majority in the New York Court of Appeals (A. 66), as well as the concurring justices in the Appellate Division (A. 55), urged that there is no constitutional difference between furnishing books under the Textbook Law and furnishing public library books. The purpose of a public library is to purchase a wide variety of books, most of which are not "textbooks" as that term is generally understood, and to make them available for a limited time to anyone in the library community. It is true, of course,

that consistent with this purpose public libraries lend books, some of which are used for school studies, to students from all schools. This system is constitutionally unobjectionable since the public libraries make the book purchasing decisions and lend directly to individual students without the intervention of parochial school officials. Public libraries, however, do not buy books at the order of religious authorities or permit exclusive utilization of books or a class of books by persons of a particular religious background or institution.

Under the Textbook Law, the choice of the particular books to be purchased from the comprehensive list for parochial school students is made by religious authorities. Indeed the only book available to the student according to the definition of textbook in the law is "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Once parochial school officials have decided on a particular biology or history text, neither the student borrower nor the public authorities have any discretion. Furthermore, the student's continued access to this book is contingent on maintaining enrollment in that particular parochial school which means he must meet religious as well as secular obligations. Finally, since the public officials are mandated by law to purchase particular books for students of a particular parochial school, these books are not then available to students from other schools or other religious backgrounds. No public library operates under these restraints or exacts these conditions. If a public library system instituted selection, purchase or lending procedures which in effect diverted its funds to the support of a sectarian institution, it too would be barred under the First Amendment.

On its face, then, the Textbook Law is constitutionally distinguishable from public library practice and constitutionally defective. In its implementation the Textbook Law bears even less resemblance to a public library system. The parochial schools order the books, they take delivery of them and they may store them when not in use. These books are in no realistic way available to the public.

E. Summary of establishment clause tax cases.

Although there are obvious difficulties in attempting to harmonize the cases dealing with the impact of the establishment clause on a state's power to tax, a rule does emerge which seems to be consistent with the history and development of the law on this subject. Stated in general terms, the rule is that if the particular public aid is earmarked for use by or within the confines of a religious institution in connection with functions associated with religion, then it is barred by the establishment clause. In short, the constitutionality of the aid turns on the nature of the benefit and how and where it is used. Thus, the aid in *Bradford* v. *Roberts,* 175 U. S. 291 (1899), was deemed permissible because the aid was used for medical care, which certainly cannot be considered a religious activity, and also because it was being used in a hospital which was run in a sectarian manner. The aid in *Quick Bear* v. *Leupp,* 210 U. S. 50 (1908), was also deemed permissible because the source of the funds was the Indian's own money, not the public treasury. And the aid in *Everson* was deemed permissible because it was not used within the confines of the parochial schools nor was it used for the teaching of religion. Similarly, the law does not prohibit the furnishing of traditional welfare benefits. Thus, for example, it is permissible for a state to provide in-school medical or

nursing care to parochial school pupils for the reason that such aid is not connected with functions associated with religion. On the other hand, textbook aid to parochial school students is forbidden. It is forbidden because the textbooks are earmarked for use by and within the confines of a religious institution in connection with the essential function of such institution which is the teaching of religion.

F. The *Everson* interpretation of the scope of the establishment clause has not been narrowed by any subsequent decision.

Although *Everson* was a tax case, it has been urged that in a series of non-tax cases after *Everson* the Supreme Court repudiated its holding in *Everson* that:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The cases, themselves, however, lend no support to this view. In *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Illinois, et al.*, 333 U. S. 203 (1948), the Court was asked to limit the *Everson* interpretation of the scope of the establishment clause's coverage and rule that the First Amendment did not prohibit impartial government assistance to all religions. It refused to do so,

> "but instead strongly reaffirmed what had been said in *Everson*, calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the Everson opinion . . . " *Torcaso, supra*, at 493.

Zorach v. *Clausen,* 343 U. S. 306 (1952), involved a released time program substantially the same as the *McCollum* program with one difference, namely, that the religious instruction was given outside the public schools. While the majority found this difference constitutionally significant, it did not repudiate the *Everson* interpretation as reaffirmed in *McCollum.* Indeed, the court's opinion specifically stated, at p. 315: "We follow the *McCollum* case."

In *McGowan* v. *Maryland,* 366 U. S. 420 (1961) and *Two Guys From Harrison-Allentown Inc.* v. *McGinley,* 366 U. S. 582 (1961), which were suits by merchants whose religious practices were not affected by Sunday Closing Laws, the Court said that the only issue was whether the purpose of the laws was to aid the conduct of religion. The Court reviewed the history of the Sunday laws and concluded that while originally the laws were motivated by religious forces, secular justifications for the laws began to evolve and these became paramount. It then held that since the laws were of a secular rather than a religious character it could not be said that their purpose was to aid the conduct of religion. In *Braunfeld* v. *Brown,* 366 U. S. 599 (1961) and *Gallagher* v. *Crown Kosher Super Market,* 366 U. S. 617 (1961), which were suits by merchants whose religious practices were affected by the laws, and where it was faced with the free exercise question as well, the Court concluded that while the laws undoubtedly made the practice of these merchants' religious beliefs more expensive, the laws were saved by a vital state interest in providing one uniform day of rest for everyone, which could only be achieved by declaring Sunday to be that day of rest.

As we have seen, a primary purpose of the Textbook Law to the extent it applies to parochial schools is to assist

such schools in teaching religion. In the *Sunday Closing Cases* the Court made emphatically clear that a law having this purpose is unconstitutional. The free exercise argument made in the *Sunday Closing Cases* is wholly inapplicable here. There it was argued that the *inclusion* of certain persons within the ambit of the law constituted an interference with free exercise of religion. Here it would have to be argued that the *exclusion* of parochial schools from the coverage of the law would constitute a denial of equal protection and a denial of religious freedom. While this is not properly an issue in this case, the answer to this is that the state is under no constitutional compulsion to treat sectarian schools the same as public schools. Not only is such classification reasonable, but it is required by the Constitution itself. Cf. *Dickman* v. *Oregon School District No. 62c,* 232 Ore. 238, 260, 366 P. 2d 533, 544 (1962), cert. den. sub nom. *Carlson* v. *Dickman,* 371 U. S. 823 (1962); *Swart* v. *South Burlington Town School District,* 122 Vt. 177, 167 A. 2d 514 (1961), cert. den. 366 U. S. 925 (1961).

The *Everson* interpretation was cited again with approval in *Engel* v. *Vitale,* 370 U. S. 421 (1962), wherein the court struck down the reading of a non-denominational Regent's prayer in public schools.

Abington School Dist. v. *Schempp,* 374 U. S. 203 (1963), concerned a law requiring all children, except those who were requested to be excused by their parents, to attend a Bible reading ceremony in school at the beginning of every class day. Having in mind the particular ceremony, the Court said, at p. 222:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then

> the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the stricture of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

That this test was not intended to replace the *Everson* test is evidenced by the fact that *Everson* was cited with approval in every opinion written in the case. What is more likely is that the Court merely was rephrasing the *Everson* test in terms of the facts of the case.

Even if this test were deemed to be applicable here, the result would be the same. The *Abington* test contemplates that a law may have more than one primary effect. If, however, any one of these primary effects advances religion, then the law cannot stand. Thus,

> "Teaching world history to elementary school students in light of a particular religious tradition, for example, fulfills the functions of both acquainting the student with the facts of history and inculcating religious perspectives. The latter would be a 'primary effect' of such teaching and would render unconstitutional the extension of state support to this activity." *

In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a Seventh Day Adventist contended that the denial of workmen's compensation to her because she refused to accept an offer to work on Saturday, her Sabbath, interfered with the free exercise of her religion. The Court ruled that the appel-

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* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II The Nonestablishment Principle*, 81 Harv. L. Rev. No. 3, 513, 534 (Jan. 1968).

lant's declared ineligibility for benefits could be sustained only if it could be shown that it would prevent grave abuses, endangering paramount interests of the State. It went on to hold that no such abuses or dangers had been advanced. Then, as it had done so many times in the past, the Court declared that its holding reaffirmed *Everson.*

Not only are these cases consistent with *Everson,* but they too point to the conclusion that the Textbook Law to the extent challenged is invalid.

An analysis of these cases reveals that they fall into two groups. One group, which includes *McCollum, Zorach,* the *Sunday Closing Cases* (in part), *Engel* and *Abington,* consists of cases where the court considered the issue to be whether the particular law constituted an impermissible aid to religion.

The other group, which includes the *Sunday Closing Cases* (in part), *Sherbert* and *Torcaso* (which was not discussed but which involved a religious test oath for office), consists of cases where the court considered the issue to be whether the particular law interfered with the free exercise of religion.

In the second group of cases, the Court said that a law which interfered with the free exercise of religion could be saved provided it could be shown that it would prevent grave abuses, endangering paramount interest of the state. Presumably the Court had in mind here abuses similar in nature to those which justified the restraints in *Reynolds* v. *United States,* 98 U. S. 145 (1878), where the Court sustained a law prohibiting the practice of polygamy, and *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), where the Court sustained a law prohibiting a nine-year old Jehovah

Witness from selling newspapers in public places. In the first group of cases, however, the court said that once it was shown that the purpose of the law was to aid religion, there were no saving considerations.

The main issue in the case at bar, as it was in *McCollum* and the other cases in the first group, is whether the purpose of the particular law is to aid religion. It has been shown that the purpose of the Textbook Law is to aid religion. Accordingly, there can be no saving considerations, and the law must fall.

G. Recent state court decisions are in accord with the appellants' views.

There have been a number of state court decisions on the constitutionality of furnishing textbooks to parochial school pupils, and apart from the decision of the New York Court of Appeals in this case there has been a definite trend away from the earlier decisions in *Borden* v. *Louisiana State Board of Education, supra,* and *Chance* v. *Mississippi State Textbook Board,* 190 Miss. 453, 200 So. 706 (1941), which upheld such practice.

In *Haas* v. *Independent School District,* 69 S. D. 303, 9 N. W. 2d 703 (1943), the Supreme Court of South Dakota construed a law providing free textbooks to pupils of a school district as applying only to public schools in order to avoid a finding that the law violated Article VI, Section 3 of the State Constitution which prohibited the appropriation of money or property for the benefit of any sectarian school. While the court preferred not to consider the constitutional questions which would have arisen had the statute been construed to cover all schools, it is interesting to note that in *Smith* v. *Donahue,* 202 App. Div.

656 (1922), the Appellate Division of the New York State Supreme Court, in considering a similar law, was willing to meet this issue. It said that if the statute were thus construed, it would violate a provision of the New York State Constitution, similar to the South Dakota ban on aid to church schools. The court rejected out of hand the argument that the books were to be supplied to the pupils and not to the schools. *Smith* was cited with approval in *Judd* v. *Board of Education*, 278 N. Y. 200 (1938), which the Court below refused to follow in this case (A. 65).

In *Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949 (1951), the Supreme Court of New Mexico ruled that the furnishing of textbooks to parochial school students not only violated Article XII, Section 3 of the State Constitution, which banned aid to sectarian schools, but also the First Amendment.

A law similar to the one in issue here was struck down in *Dickman* v. *Oregon School District No. 62c, supra*, the court holding that the law contravened Article I, Section 5 of the State Constitution which banned state aid "for the benefit of any religeous (sic) or theological institution." Among the significant features of the case were the court's rulings that the religious aspects of parochial school education are inseparable from the secular aspects, and that textbooks are an integral part of the educational process. Thus, the court found:

> ". . . the purpose of the Catholic Church in operating the St. Johns School and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion . . . [and] to some extent at least, the use of textbooks fur-

nished by the district is inextricably connected with the teaching of religious concepts." 232 Ore. at 243, 366 P. 2d at 536.

Finally, in the recent case of *Bowerman* v. *O'Connor* (Superior Court of Providence County, Rhode Island, Equity No. 31775), the court chose to follow *Dickman*, and not the New York Court of Appeals decision in this case and ruled* that a Rhode Island Textbook Law (R. I. Laws of 1963, c. 12) similar to the law at issue here violated the First Amendment as well as Article I, Section 3 of the State Constitution.

In *Bowerman*, the court took judicial notice of the fact that parochial schools are conducted by the various churches with strong emphasis upon religion and the teaching of religion. When it came to consider the First Amendment issue, the court said it was persuaded that *Everson* required a distinction to be drawn between aid which goes no further than the entrance to the school and aid which overflows into the school and contributes to what takes place inside. With respect to the Textbook Law, the court ruled:

> "Public funds are there expended for the essential functioning of the school itself, a school under religious auspices the support of which basically is banned by the First Amendment" (p. 29).

Like *Dickman*, the court saw no merit to the argument that the books were for the benefit of the child and not the school. After observing that this theory could be used to

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* References are to the unreported decision in the case.

require the equipment and maintenance of the entire parochial school educational plant (p. 29), the court pointed out that neither the furnishing of funds for the construction of parochial school buildings or for the payment of parochial school tuition has been countenanced, citing *Horace Mann League of U. S.* v. *Board of Public Works,* 242 Md. 645, 220 A. 2d 51 (1966), app. dism. 385 U. S. 97 (1966), and *Swart* v. *South Burlington Town School District, supra* (pp. 31 and 47).

POINT II

To the extent the Textbook Law requires textbooks to be furnished at public expense for use in religious schools, it violates the free exercise clause of the First Amendment because it compels a man to contribute to the propagation of opinions which he disbelieves, it creates the conditions under which the state may control religious education and it promotes a union of Church and State.

A. The law compels a man to contribute to the propagation of opinions which he disbelieves.

Both the majority and dissenting opinions in *Everson* observed that the seeds for the religious clauses of the First Amendment were planted in the Virginia debates which began in 1784 over a bill to renew a tax levy "for the support of the Christian religion, or some Christian church, denomination or communion of Christians, or for some form of Christian worship." The proponents of the bill had urged that its purpose was not to establish a religion, but in the words of the bill's preamble "to correct the morals of men, restrain their vices and preserve the

peace of society." Their attempt to save the religious establishment by masking the support of religion in the rhetoric of public purpose provoked one of the great documents on religious liberty, Madison's "Memorial and Remonstrance Against Religious Assessments." In the *Memorial and Remonstrance,* Madison urged that every man possessed an inalienable right to the free exercise of religion according to the dictates of conscience, and that religion was a private affair, exempt from state support or other interferences. He urged also that all men possessed a right to equality under the law and that a law which interfered with the free exercise of religion also violated this right, by subjecting some to burdens while granting others benefits.

Not only did this document rally opposition to the tax levy, but it led directly to the passage in 1786 of Jefferson's "Bill for the Establishment of Religious Freedom." The preamble to that Bill, proclaimed:

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher or his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . ."

And the Bill itself provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . ." *

No doubt, Jefferson's emphasis on coerced attendance and support of religion was a recognition that the power to coerce in these matters was a symbol of the long history of established religion and religious oppression. But it was also a recognition of the very special requirements for the full enjoyment of the rights of conscience and equality about which Madison spoke so eloquently. Forced attendance was clearly a denial both of freedom of religion and equality under the law. Forced support was no less obnoxious to these basic freedoms, for it too promoted an interdependence between religion and civil authority with its attendant evils. "Establishment" and "Free Exercise" were, then, merely two aspects of a single fundamental freedom, and it was this freedom that found expression in the First Amendment.

An astute commentator has noted that a man can witness to religious truth as he sees it only through freely contributing his time, his talents and his funds.** No one seriously contends that a state may force a man to attend

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* References to the proposed tax levy, the *Memorial and Remonstrance* and Jefferson's Bill are taken from the Appendix to Justice Rutledge's dissent in *Everson*, 330 U. S. at 63-74.

** George R. LaNoue, *Public Funds for Parochial School?* National Council of Churches (1963), p. 7.

church or to contribute his talents to a church. Compulsory attendance and forced observance of religious forms and ceremonies went out early in the process of separating church and state (Dissenting opinion of Justice Rutledge in *Everson*, 330 U. S. at 44). By the same token, our tradition is based on the premise that a state may not coerce a man to contribute his funds to a religious institution, or to do so through the medium of the state's taxing power.

Religious liberty cannot flourish unless religion remains a matter of conscience, free from state support and other interferences. As Justice Jackson forcefully stated in his *Everson* dissent,

> "This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse." (330 U. S. at 26.)

A state's use of its taxing powers to pay religious costs is a dangerous assault on this fundamental freedom. For, as Justice Rutledge observed in *Everson*,

> "Public money devoted to payment of religious costs, educational or other, bring the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups." (330 U. S. at 53.)

And as Justice Douglas said in *Engel:*

> "Once a government finances a religious exercise it inserts a divisive influence into our communities." (370 U. S. at 442.)

A prime illustration of the divisiveness which inevitably results when the state intrudes into essentially private affairs occurred just last year, when New Yorkers were asked to vote on a new constitution which contained, among many other provisions, a repeal of the constitutional ban on state aid to parochial schools. This church-state issue stirred passions as few others could.* But when the battle was over, the voters overwhelmingly rejected the entire proposed constitution by a margin of 3,360,613 to 1,308,472.

The money used to finance the Textbook Law is raised by taxation. To the extent books are furnished for use in a sectarian school operated by members of one faith, members of other religious faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve. This is no less an interference with religious liberty than forcing a man to attend a church. And any interference with religious liberty was intended to be outlawed by the First Amendment.

The recipients of the aid are in no less danger of losing their freedom. For if a state may aid religious schools, then it may also regulate them. As Justice Jackson pointed out in *Everson*:

> "Many persons have sought aid from tax funds only to find that it carried political controls with it." (330 U. S. at 27.)

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* Andrew Hacker, "The 'Blaine Amendment'—Yes or No?," The New York Times Magazine, October 1, 1967, p. 27.

B. The law promotes a union of Church and State.

The Textbook Law also promotes just that sort of union between religion and secular authority which the First Amendment was designed to prevent. *Engel* v. *Vitale, supra,* at 430. Under the law, the parochial school instructs its pupils what books to request. It then forwards a summary of the requests to the school board. Upon receipt of the summary the school board checks the book stocks of the parochial school to insure against duplication of books owned by such school. Then the school board sends the books to the parochial school, which, if the school board sees fit, can store the books indefinitely.

As for the books themselves, the parochial school may order any book designated by any school board. This is an open invitation for any church whose adherents dominate any one of the 800 school districts in New York to see to it that the board of this captive district designates the books which reflect the church's point of view. Once that happens, schools operated by the same church in other parts of the state can request the same books. This, in turn, will create a pressure on the other faiths and the secular authorities to be equally zealous in promoting their views. Thus, sect will be pitted against sect and the secular authorities to control the selection of books. The net effect of all this will be to diminish the freedom of both school systems. As Justice Brennan commented in *Abington*:

> "The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of

> either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures." (374 U. S. at 242.)

Pressures are a built-in feature of the Textbook Law. As Justice Van Voorhis observed in his dissenting opinion in the Court below,

> "If the state is to provide schoolbooks for instruction in 'secular' fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon the state money to provide textbooks, which are the life blood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent and at certain times and places, irresistible and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church" (A. 75).

Through the use of the state's taxing power, the Textbook Law compels a man to contribute his money to aid the proselytizing and indoctrinating efforts of religious institutions. It creates the conditions under which the state can control the aid recipients. And, in its operation and through its built-in pressures it brings about a union of church and state. It would be difficult to imagine a law which more perfectly embodies the very essence of the evils which the First Amendment sought to eradicate.

A few other arguments made in this case deserve brief consideration. The intervenor-appellees have argued that if religious schools are denied public assistance, such as textbooks, they will be forced to close their doors in consequence of which the public school population will increase and so will the cost of public education. In view of the increase in the number of parochial elementary and secondary schools and the substantial investment in their maintenance, it is easy to doubt the sincerity of this appeal. But even if this doubt is put aside, it is clear that the financial burden on the public would be the same in either event. From the standpoint of cost, it makes absolutely no difference whether aid to education is routed through the parochial schools or is paid directly to the public schools. The vital difference between the two methods lies elsewhere. Where aid is paid directly to public schools, children receive their education in a neutral atmosphere in which many viewpoints are presented. At least if the public is to be required to pay the cost of educating all the children in the state, they should not be compelled to contribute to the maintenance and continuation of a school system in which sectarian influence is a primary consideration. On the other hand, a man who chooses to exercise his right to send his child to parochial school should and must bear the additional fiscal responsibility which arises upon the exercise of such right. The choice is his alone to make. But once he opts in favor of the increased burden, he cannot compel others to share it.

Intervenor-appellees have also argued that since they all paid for textbooks before the Textbook Law went into effect, the Textbook Law really aids them and not their parochial schools. It is submitted, however, that for constitutional purposes, it makes no difference that some schools include books in their tuition while others do not. In either case payment is required by the schools. The difference, if any, between the two methods is one of bookkeeping, not of substance. To the extent the state relieves parents of the obligation to purchase books, it reduces the cost of parochial education and thereby makes it easier for the parents to send their children to these schools and for the schools to recruit pupils.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the order and judgment of the Supreme Court, Albany County, should be reinstated, except for the declaration therein that the Textbook Law violates the New York State Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX

Textbook Law as Amended

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six-sixty-seven, the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article

seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six-sixty-seven the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six-sixty-seven, the school year nineteen hundred sixty-seven-sixty-eight or the school year nineteen hundred sixty-eight-sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose. As amended L.1965, c. 320, § 2; L.1966, c. 795, both eff. Sept. 1, 1966.

THE UNIVERSITY OF THE
STATE OF NEW YORK

EDUCATION DEPARTMENT

Opinion of Counsel No. 181

To: City, Village and District Superintendents of Schools and Supervising Principals

Re: Chapter 320 of the Laws of 1965 relative to the purchase and loan of textbooks, as amended by chapter 795 of the Laws of 1966

Chapter 795 of the Laws of 1966, effective September 1, 1966, amends chapter 320 of the Laws of 1965 which is also effective September 1, 1966.

As amended by these two chapters, Article 15 of the Education Law, entitled "Text-Books", now provides as follows:

1. *Designation of textbooks-public schools.*

There is no change in the previous provisions of the Education Law, Section 701, subdivision 1. Textbooks will continue to be designated by the school board or trustee, for use in the public schools.

2. *Change of designation of textbooks-public schools.*

Section 702 has not been amended by either of the above chapters, and hence the limitation on changes of designation of textbooks for the public schools continues in effect (changes in designation may be made only upon a three-fourths vote of the school board, or five years after designation).

3. *Subversive textbooks-public schools.*

Section 704, relating to subversive textbooks has not been amended by these chapters and likewise continues in effect without change, as does Section 705 relating to certain penalties.

4. *Definition—New law.*

Subdivision 2 of Section 701 defines the term "Text-Book", for the purpose of Section 701 only, as "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Reference books, workbooks, novels and other fiction, review books, test materials, materials in kit form and other supplementary books and material are not text-books and may not be furnished.

5. *Power and duty to purchase and to loan.*

Subdivision 3 of Section 701 requires all school boards to purchase and to loan, "upon individual request", text-books as defined above, to all children residing in the district who are attending grades seven through twelve in any public school and in any non-public school which complies with the Compulsory Education Law.

6. *Limitations on kinds of textbooks.*

In order for the mandate set forth in 5 above to become applicable, it is necessary that

a. The textbook be non-sectarian (this eliminates denominational editions and those carrying the "imprimatur" or "nihil obstat" of a religious authority), and

b. The textbook had been "designated for use in any public elementary or secondary schools of the State or . . . approved by any school board".

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same itself.

7. *Fees and charges.*

Section 701, subdivision 3, requires that the textbooks be "loaned free" to the children, but authorizes school boards to make reasonable rules and regulations. Such rules and regulations may contain requirements for reimbursement, by the student to the school district, for damage, loss or destruction of loaned textbooks.

8. *Limit on requirement to purchase.*

a. Subdivision 4 of Section 701 states that no district, during 1966-67, 1967-68 or 1968-69, will be required to purchase or otherwise acquire textbooks, under this section, at a total cost to the district in excess of $15 multiplied by the total number of resident students in grades 7-12, of public schools and private schools which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities (in the judgment of the school board of the district of location of the non-public school) as the public schools of the district of location provide.

b. Textbooks need be, and may be, purchased only for resident pupils. Textbooks for children attending a school

located in one district, but which children reside in another school district, must be provided by such other school district. Textbooks need not be provided for pupils residing in a school district in this State, but attending a non-public residential school in another State.

c. The term "otherwise acquired" textbooks, which term does not appear in the basic mandate "to purchase and to loan" (Section 701, subdivision 3) merely authorizes the acquisition, in compliance with the statute, as amended, by gift, or by consolidation of school districts, or by centralization occurring after September 1, 1966.

d. Subdivision 4 of Section 701 further states that no district *during 1969-70* or during any subsequent school year will be required to purchase or otherwise acquire textbooks under this section at a total cost to the school district in excess of $10 multiplied by the total number of resident students in grades seven through twelve of public and appropriate non-public schools.

e. For the purpose of this limitation on the requirement to purchase (or otherwise acquire) in 1966-67 and thereafter, the resident enrollment of public and non-public students in grades seven through twelve must be ascertained as of October 1 of each such year. An increase or decrease of enrollment after such date will have no effect on the requirements of the statute.

f. It must be noted that subdivision 4 of Section 701 does not *require* any district to expend *at least* $15 (or $10) multiplied by the appropriate enrollment. The provision states in effect that even if the needs as resulting from other provisions of the statute are greater than that limitation, nevertheless no district need spend more than such limitation (see 15. below).

9. *Summer school.*

There is no requirement that a board purchase textbooks specifically for use at summer school; however, books may be loaned to the extent that they are on hand.

10. *Purchase of textbooks.*

Purchase orders for textbooks need to be awarded after competitive advertising to the lowest bidder, pursuant to General Municipal Law, Section 103 (unless a specific textbook can be procured only from the publisher in which case the competitive bidding procedure is not required).

Where students have been purchasing their own textbooks, the school board, if it wished to do so and considered this a wise procedure, could purchase such books from the individual students.

11. *Textbook purchases are ordinary contingent expenses.*

a. While the statute, unlike the transportation section, does not expressly so state, textbook purchases under this statute are clearly ordinary contingent expenses.

b. This is true, even where a board of education purchases textbooks in excess of the dollar amount mandated by subdivision 4 of Section 701, since the *power* to purchase is expressly vested in the school board and the limitation of subdivision 4 applies only to the *duty* to purchase.

c. Hence, in cases where budgets are defeated by the voters, the board nevertheless has the duty to purchase up to the requirement, and has the power to purchase in excess of the mandate.

d. Likewise, in those cases where district budgets have been adopted at annual meetings in 1966, the school boards

will nevertheless be required and authorized to make books available in September of 1966, irrespective of the amount contained in the budget.

12. *"Upon individual request"*:

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the nonpublic school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence.

13. *Date of payment for textbooks.*

The amendments to the Education Law under which the new procedure is authorized and required, do not become effective until September 1, 1966. Hence, no payments for textbooks ordered under the new law can be made prior to such date.

While the effective date section of the bill makes no specific exception to this effect, textbooks may nevertheless be ordered prior to the effective date.

14. *State aid.*

a. Subdivision 6 of Section 701 provides that school districts will receive an additional amount of State aid "equal to the cost of the textbooks purchased and loaned by the district pursuant to this section, but in no case . . . in excess of the following amounts: a. On account of ex-

penditures made during the school years 1966-67, 1967-68 and 1968-69, an average of $15 per pupil residing in the district and enrolled in grades 7-12, and b. on account of expenditures made in any subsequent school year an average of $10 per pupil residing in the district and enrolled in grades 7-12."

b. This means that districts will need to ascertain the total amount of money spent during each of these years for the purchase of textbooks loaned to students under the statute; thereafter the district will need to multiply the amounts of $15 and $10 respectively by the total number of resident students in grades 7-12 *as of October first* and the smaller of these two amounts (expenditure or ceiling) will be the amount of the special State aid due under subdivision 6.

c. Thereafter the amount, if any, resulting by deducting the amount of special aid arrived at under b. above, from the actual amount expended by the district for the purchase of textbooks, is added to the amount of approved operating expenses of the district pursuant to Education Law, Section 3602, subdivision 5.

d. The special aid under subdivision 6 (see b. above) is payable during the school year in which the expenditures are made to the extent that such expenditures have been made *and* reported to the Department prior to a date to be set jointly by the Commissioner and the Director of the Budget (which will be announced).

e. Aid payable under c. above, if any, becomes payable during the school year following the year of expenditure, as is all other operating expense under subdivision 5 of Section 3602, unless the district receives its operating ex-

pense aid under that subdivision, as amended by Chapter 767 of the Laws of 1966, on the budget basis. In such case operating expense aid, including the amounts here involved, will be paid currently, subject to adjustments the following year.

f. The expenditures for textbooks not exceeding the mandate are not aidable under subdivision 5 of Section 3602.

g. If a district issues bonds or notes for the purpose of financing the purchase of textbooks under the statute, the State aid payments will need to be made currently based on debt service payments of the district. In such case the "expenditure" (meaning an expenditure from local district funds) would not be made until debt service is paid and hence the "expenditure" would be made, for instance, during 1967-68 if the books are purchased from the proceeds of obligations in 1966-67 and the first debt service payment is due in 1967-68. Consequently, the aid payment would be $10, rather than $15, multiplied by the appropriate enrollment figures, if the "expenditure" is made during the school year 1969-70, and the obligations are issued during 1968-69.

15. *Procedure.*

a. The first step for a district to take is to ascertain the needs of the public and non-public students, as expressed by requests for loan of textbooks, in the various subjects. This will result in finding the number of books needed in each subject.

b. The number of books needed in each subject then must be checked against existing book stocks. It is obvi-

ously unnecessary to duplicate textbooks owned by any of the schools involved and available for the respective student's use.

Existing book stocks and newly to be purchased textbooks will need to be distributed among the respective students on an equitable basis.

c. Having ascertained the number of textbooks needed in each subject, the total amount necessary to purchase all textbooks must then be checked against the limitation on mandated expenditures for the appropriate school year, as contained in subdivision 4 of Section 701 (see 8. above).

d. Unless the necessary dollar amount is within that limitation, the board of education will then need to decide whether it wishes to exceed such limitation (as indicated in 11. above, no vote of the district is necessary for this purpose).

e. If the amount needed is in excess of both the limitation and the amount by which the school board is willing to exceed that limitation, the board will need to determine how to utilize the funds thus available in order to best meet the needs of the pupils as expressed by the requests received, on an equitable basis. Since a board of education may not discriminate between individual students in either the public or the non-public schools it is suggested that in such case the board determine how many categories of textbooks (such as science, mathematics, social studies, etc.) can be loaned free to both public and non-public pupils within the dollar amount thus available. Categories of textbooks not so included will then need to be purchased by the students themselves (unless other sources of funds are available).

16. *Accounting and storage.*

a. All books remain the property of the school district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection.

17. *Textbooks for grades 1 through 6.*

Section 703 of the Education Law (as amended by chapter 320 of the Laws of 1965) authorizes the qualified voters of common, union free, central and central high school districts, to vote a tax at an annual or special meeting for the purpose of providing free textbooks to all pupils enrolled in grades 1 through 6 of the public schools of the district. (City School Districts have their own provisions: §§2503, subd. 7 and 2854, subd. 7.)

18. *Supplies.*

Subdivision 5 of Section 701 authorizes school boards to purchase supplies and either to rent, sell or loan the same to the pupils in the public schools on appropriate terms and conditions.

19. *Legal questions.*

Any questions relating to the interpretation of Article 15 of the Education Law, as amended by both chapter 320 of the Laws of 1965 and chapter 795 of the Laws of 1966 should be addressed to the Office of Counsel or to the Law Division.

Sincerely yours,

/s/ CHARLES A. BRIND
Charles A. Brind

July 8, 1966